IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 791 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA
and
Hon'ble MR.JUSTICE R.R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DIPIKABEN DHANJIBHAAI RATHOD

Versus

VALJIBHAI VISHRAMBHAI RATHOD

Appearance:
MR KM SHETH for Petitioner
Petitioner - Dipika Dhanjibhai Rathod is also present before the court alongwith her brother-in-law (sister's husband J.M.Makwana) and one Shri Jagdishbhai who according to her is her maternal uncle.
Mr.D.R.Bhatt is present for respondent No.1 i.e. Valjibhai Vishrambhai Rathod and Valjibhai alongwith his wife is also present alongwith the child, namely, Naina alias Namrata, aged 8 years.
Ms.Harsha Devani, learned A.G.P. for respondents Nos.2 and 3.

CORAM : MR.JUSTICE M.R.CALLA
and
MR.JUSTICE R.R.TRIPATHI

Date of decision: 11/09/2000

ORAL JUDGEMENT(Per: M.R.Calla,J)

On the request of the parties, the proceedings are held in the Chamber. Having asked few questions to the girl Naina alias Namrata, aged 8 years, we find that she is not in wrongful confinement. She appears to be comfortable with her Taau and was reluctant to go with her mother. It is not in dispute that the husband of the petitioner Dhanjibhai Rathod had expired on 7.7.97. Thereafter, the question came up about the custody of the child, namely, Naina alias Namrata and the Addl. Sessions Judge, Surat by his order dated 8.9.98 set aside the order dated 3.8.98 passed in Misc. Application No.16/98 and allowed the custody of this girl with her grandmother. After the passing of the aforesaid order dated 8.9.99, the girl namely, Naina alias Namrata continued to live with her grandmother as hithertobefore. However, the grandmother expired on 23.7.2000 and, thereafter,this girl is living with her uncle (Taau -father's elder brother namely, Valjibhai). It may also be recorded here that the grandmother was living alongwith Valjibhai. While the petitioner Dipika alongwith her husband Dhanjibhai was living separately from the mother-in-law i.e. grandmother of the child Naina alias Namrata. It appears that the Court had granted the custody of the child to the grandmother on the basis that the mother is a case of HIV Positive. It is given out that the father of the girl was a case of HIV Positive and Mr. Bhatt has shown to us the case papers of Civil Hospital, Surat dated 4.7.96 showing that father namely Dhanjibhai was a HIV Positive case. It is also not in dispute that yet another daughter of the present petitioner i.e. younger sister of Naina alias Namrata, namely, Pinki, aged 6 years, is living with the mother. There is no direct evidence produced before us to show that the petitioner is a HIV Positive case. However, the case of the respondent Valjibhai is that she is a HIV Positive case, but the same has been seriously contested by the petitioner.

The petitioner is also in employment of Surat Municipal Corporation and she claims that she has been given appointment on compassionate ground on account of her husband's death while being in service. Mr. Bhatt has also pointed out that some litigation is also going

on in the Civil Court as had been filed by the grandmother of the child Naina alias Namrata; one with regard to the claim of L.I.C. of Dhanjibhai and the other with regard to the claim of retiral dues of Dhanjibhai.

In any view of the matter, it appears that Naina alias Namrata has been living with respondent No.1 and his wife right from the time when her grandmother was alive and we also do not find that she is wrongfully confined. Therefore, in this petition of habeas corpus we do not find it to be a proper case to uproot her from the family of her Taau where she is living in the company of other three kids of Valjibhai of her age group. Hence no case is made out for issue of writ of habeas corpus.

However, the present petitioner being the mother of the concerned girl, namely, Naina alias Namrata may move appropriate court in accordance with law for the custody of her daughter on the basis of the changed circumstance that the grandmother, to whom the custody had been earlier given by court by order dated 8.9.98, has expired or any other material which may be available to her including any evidence that she is not a HIV Positive case.

Looking to the entirety of the facts, we do not find it to be a fit case for issue of writ of habeas corpus but observe that it is open for the petitioner to initiate appropriate proceedings for the custody of the child i.e her daughter, namely, Naina alias Namrata. This Special Criminal Application is hereby rejected. Rule is hereby discharged.

(M.R.Calla,J)

(R.R.Tripathi,J)